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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 34,534

APONAUG MANUFACTURING COMPANY, ET AL.,
Appellants,

vs.

ALFRED H. STONE, CHAIRMAN, STATE TAX COMMISSION, ET AL.
Appellees.

JURISDICTIONAL STATEMENT.

To the Chief Justice of the Supreme Court of the State of Mississippi:

The appellants, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represent:

A.

Statutory Provision Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Judicial Code, Sec. 237(a) (28 U. S. Code, Section 344(a), [28 U. S. C. A., Section 344(a)]), reading to the extent relevant here, as follows:

> "Section 237(a). Final judgment or decree in any suit in the highest court of the state in which a decision

> could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon writ of error * * *."

The remedy, by writ of error, under the foregoing section has been abolished and an appeal substituted (Act of January 31, 1928, as amended by the Act of April 26, 1928, 45 Stat. 54, 45 Stat. 466 (28 U. S. Code, Section 861(a) and 861(b), (28 U. S. C. A. Sec. 861(a), 861(b)); *Nashville, C. and St. L. Ry.* v. *White,* 278 U. S. 456, 460, 49 S. Ct. 189, 73 L. Ed. 452; *Great Northern Ry. Co.* v. *State of Minnesota,* 278 U. S. 503, 506, 49 S. Ct. 191, 73 L. Ed. 477; *Larson* v. *State of South Dakota,* 278 U. S. 429, 49 S. Ct. 196, 73 L. Ed. 441.

B.

Statutes of the State the Validity of Which is Involved.

The statutes of the State of Mississippi, the validity of which has been sustained by the Supreme Court of the State of Mississippi, the highest court of said State, as not being violative or repugnant to the provisions of the Constitution and Laws of the United States are:

Sec. 2, Chapter 90, Page 225, Laws of 1930:

> "That from and after the 31st day of May, One Thousand Nine Hundred Thirty, there is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against the values or gross income, or gross proceeds of sales, as the case may be, as follows:
>
> * * * * * * *

Sec. 2-b, Chapter 90, Page 226, Laws of 1930:

"Upon every person engaging or continuing within this state in the business of manufacturing, compounding, or preparing for sale, profit, or use, any article or articles, substance or substances, commodity, or commodities, the amounts of such tax to be equal to the value of the articles manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same (except as hereinafter provided) multiplied by the respective rates as follows:

"Manufacturers of brick, drain tile, building tile, sewer pipe, Portland cement and Portland cement products, and clay products, one-half of one per cent; manufacturers of bottled soft drinks, and ice factories, one-half of one per cent; cotton seed oil mills, one-eighth of one per cent; all other manufacturers, one-tenth of one per cent.

"The measure of this tax is the value of the entire product manufactured, compounded, or prepared for sale, profit or use in this state, regardless of the place of sale or the fact that deliveries may be made to points outside the state.

"If any person liable for any tax under Sections (2-a) or (2-b) shall ship or transport his products or any part thereof out of the state without making sale of such products, the value of the products or articles in the condition or form in which they existed when transported out of the state and before they enter interstate commerce, shall be the basis for assessment of the tax imposed in said paragraphs; and the Tax Commission shall prescribe equitable and uniform rules for ascertaining such values.

"In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the Tax Commission

shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by the other taxpayers where no common interest exists between the buyer and seller, but otherwise under similar circumstances and conditions."

Sec. 16, Chapter 90, Page 237, Laws of 1930:

"The administration of this Article is vested in and shall be exercised by the Tax Commission, except as otherwise herein provided, and the enforcement of any of the provisions of this Article in any of the courts of the state shall be under the exclusive jurisdiction of the Tax Commission which may require the assistance of and act through the prosecuting attorney of any county, or any district attorney, and may with the assent of the Attorney General of the State, employ special counsel in any county to aid the prosecuting attorney, the compensation of whom shall be fixed by and paid only upon the approval of the Attorney General; but the district attorney or prosecuting attorney of any county shall receive no fees or compensation for services rendered in enforcing this Article in addition to the salary paid to such officer. The Tax Commission shall appoint, as needed, such agents, clerks and stenographers as authorized by law, who shall serve under the Tax Commission, shall perform such duties as may be required, not inconsistent with this Article, and are hereby authorized to act for the Tax Commission as it may prescribe and as provided herein. Each such agent shall execute a bond in the sum of Five Thousand Dollars ($5,000.00) for the faithful discharge of their duties. All of such agents, clerks and stenographers may be removed by the Tax Commission for cause."

Sec. 2-b, Chapter 119, page 168, Laws of 1934:

"Upon every person engaging or continuing within this state in the business of manufacturing, compound-

ing, or preparing for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, any article or articles, substance or substances, commodity or commodities, the amount of such tax to be equal to the value of the articles, substances, or commodities, manufactured, compounded, or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same (except as hereinafter provided), multiplied by the respective rates as follows:

"Manufacturers of brick, drain tile, building tile, sewer pipe, portland cement and portland cement products and clay products, one per cent; manufacturers of bottled soft drinks, one per cent; ice factories, one-fourth of one per cent; cotton seed oil mills, one-fourth of one per cent; manufacturers of feed and feed stuffs, one eighth of one per cent; all other manufacturers on whose gross income a tax is not otherwise levied in this act, one-fourth of one per cent.

"The measure of this tax is the value of the entire product manufactured, compounded, or prepared, in this state, for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the state.

"If any person liable for any tax under this section shall ship or transport his products, or any part thereof, out of this state without making sale of such products, the value of the products in the condition or form in which they existed immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in this section. The commissioner shall prescribe equitable and uniform rules for ascertaining such value; and the tax imposed in this section shall be due and payable as of the date of such removal from the state, whether said products have been sold or not.

"In computing the tax levied under this section, where the gross proceeds of sales of such natural resource products are taken as the measure of the value of such products for the purpose of computing the

tax, if such products shall have been sold on a delivered price, the actual freight charges prepaid by the taxpayer or included in the invoice price, on such natural resource products, to the place of delivery, shall be deducted from the gross proceeds of sales used in determining the amount of the tax.

"Where delivery of any products is made by a producer, taxable under this section, to other affiliated companies or persons, or under other circumstances where the relation between the producer and the receiver of such products is such that the consideration paid, if any, is not indicative of the true value of the products delivered, the producer shall pay the tax imposed by this section for the privilege of engaging in the business of producing the products so delivered, measured by the value, corresponding as nearly as possible to the gross proceeds of sale of similar products, of like quality and character, by other taxpayers, where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar."

Sec. 3, Chapter 158, Page 169, Laws of 1936:

"That Section 2-b of Chapter 119, Laws of 1934, be and the same is hereby amended so as to read as follows:

"Upon every person engaging or continuing within this state in the business of manufacturing, compounding, or preparing for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, any article or articles, substance or substances, commodity or commodities, the amount of such tax to be equal to the value of the articles, substances, or commodities, manufactured, compounded, or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same (except as hereinafter provided), multiplied by the respective rates as follows:

"Manufacturers of brick, drain tile, building tile, sewer pipe, portland cement and portland cement prod-

ucts and clay products, one per cent; manufacturers of bottled soft drinks, one per cent; ice factories, one-fourth of one per cent; cotton seed oil mills, one-fourth of one per cent; manufacturers of feed and feed stuffs, one eighth of one per cent; all other manufacturers on whose gross income a tax is not otherwise levied in this act one-fourth of one per cent.

"The measure of this tax is the value of the entire product manufactured, compounded, or prepared, in this state, for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the state.

"If any person liable for any tax under this section shall ship or transport his products, or any part thereof, out of this state without making sale of such products, the value of the products in the condition or form in which they existed immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in this section. The commissioner shall prescribe equitable and uniform rules for ascertaining such value; and the tax imposed in this section shall be due and payable as of the date of such removal from the state, whether said products have been sold or not.

"In computing the tax levied under this section, where the gross proceeds of sales of such manufactured products are taken as the measure of the value of such products for the purpose of computing the tax, if such products shall have been sold on a delivered price, the actual freight charges prepaid by the taxpayer or included in the invoice price, on such manufactured products, to the place of delivery, shall be deducted from the gross proceeds of sales used in determining the amount of the tax."

C.

Date of Judgment and Date of Application for Appeal.

On the 28th day of April, 1941, the Supreme Court of Mississippi rendered its opinion, which is made a part of the

record herein, and is the opinion upon which the judgment appealed from was entered, the same being reported in —— Miss. ——, 1 So. (2) 763. Thereafter on the 13th day of May, 1941, appellant filed its suggestion of error pursuant to Rule 14 of the Supreme Court of Mississippi (Miss. Code of 1938 Supplement, page 1900, Rule 14). Thereafter the suggestion of error thus filed was overruled by the Supreme Court of the State of Mississippi, and judgment was entered on the 26 day of May, 1941, effective as of that date (*Love* v. *Mayor and Board of Aldermen of Yazoo City,* 166 Miss. 322, 148 So. 382). The judgment of the Supreme Court of the State of Mississippi sustained the action of the Circuit Court of Hinds County, Mississippi, in sustaining the demurrer to appellant's declaration and dismissing the cause. The judgment of the Supreme Court of the State of Mississippi is the final judgment within the meaning of Judicial Code, Section 237 (as amended 28 U. S. C. A., Section 344).

The time for taking the appeal began to run on the date of the final judgment of the Supreme Court of the State of Mississippi, to-wit, May 26, 1941.

D.

Nature of Case and Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdiction of the provisions relied upon are as follows:

Appellant, Aponaug Manufacturing Company, filed its declaration in the Circuit Court of Hinds County, Mississippi, against Alfred H. Stone, Chairman, State Tax Commission, and against State Tax Commission seeking to recover certain sales taxes theretofore paid by appellant. The declaration was in two counts, the first count covering taxes which had been paid by the appellant itself to the

State of Mississippi, and the second count covering taxes paid by the Cotton Mills Products Company, a corporation domiciled in Montgomery County, Mississippi, the latter company having assigned its claim to a refund to appellant. The total amount involved was approximately $20,000.00 with interest.

Appellee filed a demurrer to the declaration and a motion to dismiss the cause, both of which were sustained by the court, and from this order of the court an appeal was prosecuted to the Supreme Court of Mississippi (1 So. (2) 763). On the appeal to the Supreme Court of Mississippi the judgment of the Circuit Court of Hinds County, Mississippi, was affirmed.

Appellant alleged in its declaration that it was engaged in the operation of cotton mills at various points in the State of Mississippi, at which raw cotton was manufactured into finished goods; that since 1930, and for many years prior thereto, appellant has paid all lawful taxes required of it, and that from 1930 to the date of filing its declaration it has paid all taxes which were levied under the provisions of Chapter 90 of the Laws of Mississippi for 1930, and General Sales Tax Laws amendatory and supplemental thereto; that plaintiff was a manufacturer of cotton goods, and that it sold and shipped substantially the entire products of its mill to points outside the State of Mississippi; that it manufactured cotton goods chiefly on orders previously obtained from customers at points outside the State of Mississippi, and for shipment outside the State of Mississippi; that probably two-thirds of the goods manufactured by plaintiff was sold and shipped to New York City for use there, or for reshipment to other points in the United States, or for export to foreign countries; that the sales tax laws of the State above referred to, as construed and administered by the State Tax Commission, of which Alfred H. Stone, defendant, was Chairman, imposed a tax measured substan-

tially or entirely by the sales, constituted a direct burden on the interstate commerce of the plaintiff, and by the method of its measurements, reached the entire interstate commerce of the plaintiff; that other States in which sales are made, and to which said shipments are made and to which the commerce of the plaintiff extended might, with equal rights, lay a tax similarly measured, thus exposing the plaintiff in a real and direct way to the danger of cumulative or multiple burdens, each measured by the interstate commerce of the plaintiff, thus imposing a burden on interstate commerce of the plaintiff and discriminating against such interstate commerce of the plaintiff, all in contravention of the rights of the plaintiff and the power of Congress under Article I, Par. 8, of the Constitution of the United States; and that the application of such tax also amounted to a taking of the property of the plaintiff without due process at law, and denying to it the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States. Thereupon, appellant demanded judgment in the sum of $15,037.27, representing taxes paid by it to December 15, 1939, together with interest thereon from the date of payment as shown on a certified statement attached as an exhibit to the declaration.

The second count of the declaration alleged a similar cause of action in favor of the Cotton Mills Products Company and the assignment thereof to appellant, and demanded judgment in the amount of $4,244.10, with interest, etc.

The appellee filed a motion to dismiss, and with it a demurrer to the declaration. On consideration of the motion and demurrer the Circuit Court of Hinds County, State of Mississippi, entered its order sustaining the demurrer and dismissing the cause at the cost of the plaintiff.

Timely appeal was prosecuted to the Supreme Court of the State of Mississippi, which rendered its opinion sustaining the action of the Circuit Court of Hinds County,

Mississippi. Judgment thereon was duly entered as hereinabove set out.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code (28 U. S. C. A. 344 (a)); *Western Live Stock* v. *Bureau of Internal Revenue*, 303 U. S. 250, 82 L. Ed. 823, 115 A. L. R. 944; *Adams* v. *Storen*, 304 U. S. 307, 82 L. Ed. 1365, 117 A. L. R. 429; *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 83 L. Ed. 272; *Veix* v. *Sixth Ward Building & Loan Association of Newark*, 310 U. S. 32, 84 L. Ed. 1064.

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EXHIBIT "A".

IN THE SUPREME COURT OF MISSISSIPPI.

No. 34,534.

In Banc: 14660.

APONAUG MFG. COMPANY

vs.

STATE TAX COMMISSION, et al.

GRIFFITH, *J.:*

Appellant is engaged in the operation of cotton mills at various points in this State. The State Tax Commissioner has demanded of and collected from appellant, and appellant has paid under protest, the tax or remuneration required by Section 2, Chap. 119, Laws 1934, which, so far as material to this case, is as follows:

"There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows: * * *

"Upon every person engaging or continuing within this state in the business of manufacturing * * * for profit or commercial use * * * any article or articles, substance or substances, commodity or commodities, the amount of such tax to be equal to the value of the articles, substances, or commodities, manufactured, compounded, or prepared for sale, as shown by the gross proceeds derived from the sales thereof by the manufacturer, * * * multiplied by the respective rates as follows:

"The measure of this tax is the value of the entire product manufactured, compounded or prepared, in this state, for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the state.

"If any person liable for any tax under this section shall ship or transport his products, or any part thereof, out of this state without making sale of such products, the value of the products in the condition or form in which they existed immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in this section." * * *

It is conceded that the amount of the tax applicable in the present case, if applicable at all, is one-fourth of one per cent, ascertained or computed as set forth in the foregoing quotations.

Appellant sells its manufactured cotton goods chiefly in states other than this State. About two-thirds of its products are shipped to and sold in the City of New York, and is said to be there subject to the sales tax imposed by that city. Appellant contends that this exposes it to cumulative or multiple burdens in violation of its rights in interstate commerce, and that the one-fourth of one per cent tax exacted by this State, as above set out, ought to be stricken down as an undue burden on interstate commerce, or as an unlawful imposition upon appellant in its business in interstate commerce. Appellant relies chiefly on such recent cases as Western Live Stock *v.* Bureau of Internal Revenue, 303 U. S. 250; Coverdale *v.* Arkansas Pipe Line Co., 303 U. S. 604; Adams Mfg. Co. *v.* Storen, 304 U. S. 307; Gwin et al. *v.* Hanneford, 305 U. S. 434, and McGoldrick *v.* Berwind-White Coal Co., 309 U. S. 33.

Taking the pleadings strongest against the pleader, we must assume that the business of appellant as a manufacturer of cotton goods in this State is such that at its factory or factories it receives the cotton in bales as it comes from the gins or compresses, and thence with men and machinery it puts this cotton through all the required processes until turned out in bolts of cloth ready to be sold as such in the markets both intrastate and interstate. For the protection in all its manifold forms afforded by the State to appellant, and those likewise engaged within this State, in the peaceable pursuit of that business or activity and in the process thereof, the State exacts the remuneration which is prescribed by the quoted statute, and it is immaterial by what

name the remuneration is designated. Names are unimportant, since the facts remain the same, whatever the set-up thereof may be called.

Nor are these definite facts, and the remuneration exacted when the facts are present, to be displaced by or confounded in what is referred to as multiple taxes merely because other or further taxes may be imposed when the goods are sold or manufactured into garments in another state, or in this State. Certain it is that on tax will, for it cannot, be again imposed for the exercise of the activity which is described in the preceding paragraph,—the simple reason being that under physical facts there cannot again be actively or actually done anywhere what has already here been done as thus described.

And the exacted remuneration is laid upon the fair and just basis of the volume of the production; and while the primary, but not the exclusive, method for determining the volume is to measure it by the amount of the sales of the produced articles, this does not make the sales the subject of the exaction, but it is merely a convenience in arriving at the quantity or extent of the production, so that nevertheless, the distinct local activity in the production is the real subject of the exaction. All that is required as the factual basis of a sales tax, as such, is that there shall be an executed sale, and this without regard to where, when, or by whom the vended article was manufactured. The tax we are here considering is not upon sales, but upon the business or activity of manufacture done in this State—the producing of the article for sale, wherever it may be that it is then sold; and in upholding the tax we have the definite support of American Mfg. Co. *v.* St. Louis, 250 U. S. 459, 63 L. Ed. 1084, which as we think has not been displaced by any subsequent ruling of the federal supreme court.

Affirmed.

Alexander, J., took no part in the decision of this case.

Endorsed on back: 34,534. Aponaug Mfg. Company vs. State Tax Commission, et al. Filed 4/28/41. Tom Q. Ellis, Clerk. 14660.

(6300)